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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/522,914

01/28/2005

Richard D. Gresham

2857 (203-3424)

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10/22/2008

Covidien
60 Middletown Avenue
North Haven, CT 06473

EXAMINER

MCEVOY, THOMAS M

ART UNIT

PAPER NUMBER

3731

MAIL DATE

DELIVERY MODE

10/22/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<p align="center">Advisory Action Before the Filing of an Appeal Brief</p>	<p>Application No. 10/522,914</p>	<p>Applicant(s) GRESHAM, RICHARD D.</p>	
	<p>Examiner THOMAS MCEVOY</p>	<p>Art Unit 3731</p>	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 25 September 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-3,5-26,30.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Todd E Manahan/
Supervisory Patent Examiner, Art Unit 3731

Continuation of 11. does NOT place the application in condition for allowance because:

The pending claims would be rejected as before under 35 U.S.C. 102 and 103 in the prior Final rejection of record. Applicant's arguments have been fully considered but are not persuasive.

Applicant argues that the cover of Bulow et al. does not cover a body portion of a surgical instrument. Examiner respectfully disagrees. In a broad sense, the conduits 32, 42 and 52 can be considered as body portions of the surgical instruments shown in Figure 1.

Applicant argues that the cover of Bulow et al. is not adjacent to the tool assemblies. Bulow et al. disclose that the cover 12 is intended to be secured to the surgical conduits. Unless Bulow et al. disclose that only certain portions of the conduits can be secured, one would reasonably expect that the cover can be secured to any portion of the conduits, including portions adjacent to the tool assemblies. Examiner further believes that the position of the cover in Figure 1 could be considered as adjacent to the tool assemblies in a broad sense.

Applicant argues that the distal end of the Jespersen cover is not secured to the surgical instrument adjacent to the assembly. In paragraph 0044 of Jespersen it is disclosed that the distal end of the cover 16 is sealed to the instrument by lip 57.

Applicant argues that in the first position the tool assembly of Jespersen is not uncovered. Examiner believes that Figure 5A of Jespersen clearly shows that the tool assembly is not covered and this can be regarded as the first position.

Applicant argues that the tool assembly of Jespersen becomes uncovered in the second position. Paragraph 0044 of Jespersen discloses that the Figure 5A embodiment is to be "swallowed" by the everted bag (cover).

Applicant argues that the cover 127 of Green et al. does not cover the shell assembly. Examiner has referred to Figure 15 as an example where the cover is over the shell assembly. Although the cover may not cover the portion of the assembly which contains the staples, it does cover a portion of the assembly. For example, it can be seen in Figure 11 that base member 134 is definitely part of the assembly which contains the staples (at 134B). Furthermore it is not clear from Green et al. whether the cover 127 does cover portions of 134B. The cover is disclosed as possibly butting up against anvil member 136A in Figure 15B but in Figure 11 anvil member 136A is shown as being shorter than staple containing portion 134B, which would then indicate that the cover can be over the staple containing portion 134B.

Applicant's amendments to the claims would be sufficient to overcome the previous claim objections and 35 U.S.C. 112 2nd rejections of record.